

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

THOMAS A. DIBARTOLO,  
  
Petitioner,  
  
vs.  
  
ELDON VAIL and ASHBEL T.  
WALL,  
  
Respondent.

NO. CV-03-094-EFS

ORDER DENYING EMERGENCY PETITION  
FOR EXTRAORDINARY RELIEF

BEFORE THE COURT is Petitioner's Emergency Petition for Extraordinary Relief. (Ct. Rec. 34). Petitioner is a Washington State prisoner currently housed within the Rhode Island Department of Corrections in Cranston, Rhode Island. By Order filed May 4, 2004, the Honorable Robert H. Whaley, District Court Judge, dismissed Mr. DiBartolo's federal habeas petition pursuant to 28 U.S.C. § 2254 (Ct. Rec. 25). The Ninth Circuit Court of Appeals affirmed that decision by Mandate filed December 27, 2004 (Ct. Rec. 32).

Mr. DiBartolo now seeks to compel discovery of evidence regarding his 1997 criminal conviction in order to file a future petition. In his 99-page petition, Mr. DiBartolo seeks access to any and all evidence comprising the Spokane County Prosecuting Attorney's case-in-chief, particularly photographic, video and audio materials, as well as all

1 defense materials.<sup>1</sup> He also asks this court to declare a state court  
2 rule unconstitutional.

3 Petitioner fails to specify what additional evidence he could  
4 develop, why that evidence "could not have been previously discovered  
5 through the exercise of due diligence," or how the additional evidence  
6 he wishes to develop would have likely affected the outcome of his  
7 trial. See 28 U.S.C. § 2254(e)(2)(A)(ii); *Williams v. Taylor*, 529 U.S.  
8 420, 432, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). "Habeas is an  
9 important safeguard whose goal is to correct real and obvious wrongs. It  
10 was never meant to be a fishing expedition for habeas petitioners to  
11 explore their case in search of its existence." *Rich v. Calderon*, 187  
12 F.3d 1064, 1067 (9th Cir. 1999) (citing *Calderon v. U.S.D.C. (Nicolaus)*,  
13 98 F.3d 1102, 1106 (9th Cir. 1996)). As Mr. DiBartolo is not entitled  
14 to pre-petition discovery in search of evidence that may or may not  
15 support his claims, **IT IS ORDERED** the Petition (Ct. Rec. 34) is **DENIED**.

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19 Petitioner asserts he wishes to raise a post conviction argument  
20 of improper, inaccurate and manipulated photographic evidence that  
21 allegedly violated the "cannons of evidence law" [42]. He also wishes  
22 to challenge the prosecution's recreation and demonstration of the  
23 crime through the services of a particular Forensic  
24 Animation/Recreation Specialist who was unavailable at the time of  
25 trial[45]. He plans to assert malicious prosecution and prosecutorial  
26 misconduct in the willful presentation of false scientific evidence  
27 [47].

